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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON, *et al.*,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENT

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A.L. Engelberg and T.C. Doege, *Review of Part 67 of the Federal Air Regulations and the Medical Certification of Civilian Airmen*, (Amer. Medical Ass'n 1986)	25

Cited Authorities

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Aeromedical Reference and Waiver Guide: Physical Exams and Standards, <http://www.nomi.navy.mil/code04/toc97nf.htm>	26
Air Force Publications, AFI 48-123: Medical Examination and Standards, <http://afpubs.hq.af.mil/elec-products/pubpages/48-pubs.stm>	26
Eye Care Visits and Use of Eyeglasses or Contact Lenses 29, Vital & Health Statistics Series 10, No. 145 (1984)	8
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Revision of Medical Standards and Certification Procedures, 59 Fed. Reg. 53,226 (1994)	26
U.S. Dept. of Health & Human Servs., *Office Visits to Ophthalmologists and Other Physicians for Eye Care Among the U.S. Population* (1995)	8
Webster's Third New Int'l Dictionary 652 (Merriam-Webster 1981)	7

INTERESTS OF THE *AMICUS CURIAE*[1]

The Air Transport Association of America, Inc. ("ATA"), is a membership organization of twenty-three U.S. certificated air carriers. ATA's members account for more than 97% of the domestic passenger and cargo traffic flown annually by U.S. carriers and employ over half a million people, including more than 50,000 pilots.[2] ATA's members have a vital interest in the safety of commercial air transportation; they are required by the Federal Aviation Act to observe the "highest possible degree of safety" in their operations. The Federal Aviation Administration adopts minimum licensing standards for pilots, but the construction of the Americans With

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1. Petitioner and Respondent have consented to the filing of this brief and their consent letters are filed herewith. United Airlines is a member of ATA, but no counsel for a party has authored this brief in whole or in part and no party has made monetary contribution to the preparation or filing of this brief.

2. ATA regularly represents the interests of its member carriers in legislative, judicial and administrative matters. ATA has filed numerous *amicus* briefs in federal and state court proceedings concerning a broad variety of aviation-related issues. ATA also works closely with the various Federal agencies that regulate the airline industry such as the Federal Aviation Administration and the Department of Transportation. ATA's members are Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are Aerovias de Mexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

Disabilities Act ("ADA") urged by the Petitioners threatens to turn these licensing minimums into an industry-wide ceiling on hiring standards. ATA and its members are concerned that this construction would displace the Federal Aviation Act's safety imperative without an express statement from Congress that it intended such a far-reaching result.

Because the Federal Aviation Act and its implementing regulations impose upon ATA's members an affirmative obligation to operate with the highest possible level of safety, each carrier has a particular interest in the degree to which courts and juries applying laws unrelated to aviation such as the ADA may be permitted to adjust the qualifications/safety calculus performed by airlines when hiring individuals for safety-related positions. The ATA is uniquely suited to provide the airline industry perspective regarding the interrelationship between the important commands of these two statutory regimes. Accordingly, ATA files this brief as *amicus curiae* in support of the Respondent.

SUMMARY OF ARGUMENT

1. The American with Disabilities Act ("ADA" or "the Act"), was enacted by Congress to address the "political powerlessness [of the disabled] in our society" and encourage the "full participation, independent living, and economic self-sufficiency [of] such individuals." 42 U.S.C. §§ 12101(7) and (8) (1994). The Act was designed to "bring persons with disabilities into the economic and social mainstream of American life." H. R. Rep. No. 101-485(II), at 22-23 (1990), *reprinted in* 1990 U.S.C.A.A.N. 303, 304. Congress believed that the disabled are "uniquely underprivileged and disadvantaged, much poorer, much less well-educated, and have much less social life" than the non-disabled, *id.* at 31,

and that "discrimination [against the disabled has] result[ed] in dependency on social welfare programs" costing American taxpayers billions of dollars. *Id.* at 43.

Petitioners are nearsighted. Because they wear corrective lenses, they function with 20/20 vision. This does not render them "uniquely underprivileged and disadvantaged," and there can be no suggestion that the nearsighted as a class are now, or have ever been, "political[ly] powerless[] in our society." Those who rely on eyeglasses do not need the assistance of Congress in order to the join the "economic and social mainstream of American life"; nor are they disproportionately dependent on social welfare programs. Petitioners have a commonplace shortcoming that is entirely eliminated by corrective lenses. This is not a condition the ADA was designed to address.

2. A disability discrimination claim under the ADA depends upon proof that the plaintiff is "substantially limited in one or more major life activities." Petitioners' Amended Complaint admits that they are not so limited. Once Petitioners put on their corrective lenses, they each have perfect 20/20 vision. Thus, neither of the Petitioners is *actually* limited in what she can do in any substantial way by her eyesight.

Because the Petitioners suffer from no actual, real-world limitation in their daily activities attributable to their eyesight, Petitioners and their *amici* insist that the Court assess their "disabled" status by *ignoring* their *actual* capacities, and instead theorize about what might be true if the Petitioners had no corrective lenses. The EEOC argues, in its brief and in its non-binding "interpretive guidance" to the ADA, that a person who takes medication, uses a device, or employs some

other mitigating strategy which eliminates *entirely* the deleterious impact of an ailment may nonetheless be "disabled." This argument is based solely on the hypothesis that the plaintiff *would* be "substantially limited" *if only* he or she stopped using the mitigating measures. Thus, in the EEOC's view, the "substantiality" inquiry required by the ADA is not an assessment of *actual* limitations in major life activities, as Congress plainly intended, but an exercise in hypothetical projections. This "what if" analysis is inconsistent with the statute's plain language and would dramatically expand the number of Americans eligible to sue under the ADA.

3. Airlines impose stringent hiring standards for safety-related positions — standards which necessarily are far more stringent than those applicable to virtually all other jobs in the national economy. The airlines set these hiring standards because the Federal Aviation Act requires air carriers to observe the very *highest* degree of safety. The Federal Aviation Administration ("FAA") sets minimum safety standards for licensing pilots, but air carriers are encouraged to establish standards higher than the FAA's if the carrier determines in its own judgment that those higher standards will foster a higher degree of safety in the context of their own operations. This federal mandate distinguishes the airline industry from nearly all other workplaces in the national economy.

> The uncertainty implicit in the concept of managing safety risks always makes it "reasonably necessary" to err on the side of caution .... The employer cannot be expected to establish the risk of an airline accident "to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound."

Western Airlines v. Criswell, 472 U.S. 400, 419-20 (1985) (citation omitted). For this reason, the Court should be reluctant to adopt the dubious textual reading of the ADA urged by Petitioners, a reading which fails to recognize or accommodate the congressional safety mandate applicable to commercial airline pilots who are responsible for the lives of millions of Americans every day. A construction of the ADA which gives jurors the final voice in determining questions of airline safety undermines the Federal Aviation Act's safety mandate.

The unavoidable, practical consequence of the Petitioners's construction of the ADA would be a single, industry-wide set of hiring standards — set at the lowest common denominator (*i.e.*, the FAA minimums) — in contravention of the Federal Aviation Act's statutory design. ATA believes that if the ADA is applied as it is written — as Congress intended — there is no inconsistency between the commands of the Federal Aviation Act and the ADA. Because Petitioners are not "substantially limited" in their daily life activities by their visual acuity, and because there are only a relative handful of jobs in the national economy for which their vision might make them uncompetitive, they are not disabled as defined in the ADA. Nonetheless, the unique regulatory environment in which airlines operate underscores the danger of giving the ADA an expansive interpretation — unwarranted by its explicit terms — that would empower any court or jury to review each airline hiring decision under its own idiosyncratic notion of "the highest possible degree of safety."

Petitioners' contention that there are no safety dimensions to the standards adopted by United is simply wrong. The FAA applied an "uncorrected vision" standard for more than 30 years (even after the passage of the ADA), and similar

standards are currently imposed by the Air Force and Navy for their pilots. It cannot be impermissible under federal law for an airline like United, operating on the basis of its own good faith judgment, to adopt a hiring standard that is currently, and lawfully, imposed by the federal government itself for similar safety-sensitive positions. If the view of the ADA urged by Petitioners is adopted, the threat of case-by-case litigation with individuals like Petitioners, who are not disabled, would create a perverse incentive for airlines to lower their hiring standards to the FAA's minimums, turning those regulatory minimums into industry maximums contrary to Congress's explicit statutory design.

ARGUMENT

I.

INDIVIDUALS WHO HAVE 20/20 VISION WHEN WEARING CORRECTIVE LENSES DO NOT HAVE DISABLING IMPAIRMENTS WITHIN THE MEANING OF THE ADA

An individual is "disabled" under the ADA if she has "a physical or mental impairment that substantially limits [her in] one or more . . . major life activities." 42 U.S.C. § 12102(2)(A). Petitioners' poor eyesight is not an impairment; it is merely a common "physical characteristic" placing Petitioners "within [the] 'normal' range" of physical capacities shared by other Americans. 29 C.F.R. § 1630.2(h) App. (1998). Moreover, even if Petitioners' poor eyesight is an "impairment," it does not "substantially limit" them in any major life activity. Petitioners claim that they are disabled because they could not see properly or work effectively if they did not wear corrective lenses. They do, however, wear corrective lenses, and when they do, they are not, in fact, limited in their ability either to work or to see. The plain

language of the statute demands an assessment of the Petitioners' actual capacities; it requires proof that the Petitioners' ability to engage in "major life activities" *is* "substantially limited," not in theory but in fact. Because there is no such allegation in their Amended Complaint, the district court properly dismissed this lawsuit.

A. The Commonplace Physical Trait Of Nearsightedness Is Not An Impairment Under The ADA

The term "impairment" is not defined in the text of the ADA. The regulations, and the EEOC's interpretative guidance regarding the ADA, however, explain that physical characteristics or attributes "within the normal range" of common human experience are not impairments:

> It is important to distinguish between conditions that are impairments and physical . . . characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone *that are within "normal" range and are not the result of a physiological disorder*.

29 C.F.R. § 1630.2(h) App. (emphasis added).[3]

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3. By including changeable characteristics such as weight and muscle tone in the quoted language, the EEOC disposes of any contention that the "normal range" limitation applies only to immutable characteristics such as height. The reference to a "physiological disorder" at the end of the quoted passage is circular surplusage. The ADA does not define the term "disorder," but Webster's defines it as "an *abnormal* physical or mental condition." *Webster's Third New Int'l Dictionary* at 652 (Merriam-Webster 1981) (emphasis added). Thus, a condition within the "normal range" cannot be a disorder.

Petitioners wear corrective lenses to correct imperfect vision, like more than 100 million other Americans, and therefore fit well within the "normal range."[4] Indeed, a U.S. Department of Health & Human Services study found that nearly two-thirds of adults wear corrective lenses.[5] Because Congress enacted the ADA on the premise that "some 43 million have one or more . . . disabilities," 42 U.S.C. § 12101(a)(1), it is self-evident that Congress did not believe that the 100 million Americans who use glasses to work, read, or drive are "disabled" or suffering from an impairment.[6]

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4. *See A National Plan 1999-2003: A Report of the National Advisory Eye Council*, U.S. Department of Health and Human Services, Public Health Service, National Inst. of Health and National Eye Inst., at 7.

5. *See Eye Care Visits and Use of Eyeglasses or Contact Lenses* 29, Vital & Health Statistics Series 10, No. 145 (1984); *accord* U.S. Dept. of Health & Human Servs., *Office Visits to Ophthalmologists and Other Physicians for Eye Care Among the U.S. Population* (1995). The EEOC claims that only those with severe nearsightedness would be covered by the ADA, but the distinction is a meaningless one in the substantial limitation inquiry Congress devised. Contacts or glasses are both necessary and freely available to correct simple nearsightedness, whether the individual's eyesight is 20/50 or 20/400. If the vision problems are fully and easily correctable, they have no "effect on the life of the individual," regardless of how poor the *uncorrected* vision might be. 29 C.F.R. § 1630(j) App.

6. The EEOC's entire argument on the "impairment" issue is contained in this sentence:

> Petitioner's poor vision is a "physical . . . impairment" that satisfies the regulatory definition of the term, *i.e.*, a "physiological disorder *or* condition, . . . affecting . . . special sense organs." 29 C.F.R. § 1630(h)(1).

(Cont'd)

B. Only Individuals Who Actually Suffer Substantial Limitations In Major Life Activities Are Disabled Within The Meaning Of The ADA

Petitioners do not — and could not — contend that individuals with fully correctable visual acuity problems actually suffer substantial limitations in their real-world ability to perform major life functions. Indeed, they affirmatively allege that "with corrective measures, [each of them] function[s] identically to individuals without a similar impairment." J.A. 24. By definition, if an individual's acuity problems are fully corrected through the use of glasses or contact lenses, that individual can see, read, work, or drive as well as someone who does not need corrective lenses to achieve 20/20 vision.

Because Petitioners admit that they suffer from no actual, real-world limitation, they argue that the "substantial limitation" inquiry should ignore their daily reality in favor of a speculative "what-if" analysis. According to Petitioners and the EEOC, in an ADA case, the court must ignore a plaintiff's *actual* capacities and premise its disability determinations on a projection of what life for the plaintiff would be like in the *absence* of the mitigating measures the plaintiff actually uses.

(Cont'd)
EEOC Br. at 7 (emphasis added). With the definition excerpted in this way, eye color would be an impairment, *i.e.*, a "condition affecting special sense organs." The EEOC's definition, therefore, fails to account for Congress' evident desire that "minor, trivial impairments" would not be covered by the ADA. S. Rep. No. 101-116 (1989), *reprinted in* H.R. Comm. on Education and Labor, 101st Cong., 2d Sess., Legislative History of Public Law 101-336, at 121 (Comm. Print 1990).

Thus, under the EEOC's construction of the ADA, former President George Bush — who signed the ADA into law — would be disabled because he suffered from Graves Disease.[7] To eliminate the disease, President Bush had his thyroid chemically destroyed, and he takes — and will take for the remainder of his life — a daily dose of replacement hormone. *Id.* If President Bush ever failed to take his daily medication, he could lapse into a coma or die,[8] but because he *actually* takes the hormone, his physician reports that he is in "excellent physical health, . . . jogging [and] conducting all of his business without any side effects from his medication and without any lingering problems from his . . . Graves disease."[9] To the EEOC, it is simply irrelevant that President Bush does not *actually* suffer from a substantial limitation in any major life activity, because if, hypothetically, he ever failed to take his medication, he *would* be so limited.

The language of the ADA cannot bear the EEOC's construction: a disability is an "impairment *that substantially limits* [an individual in] one or more major life activities," not one which might, under some (absent) circumstances, cause such a limitation.[10] The text of the ADA demands an

7. *See Bush Starts Daily Thyroid Medication*, Washington Post, July 10, 1991, at A2.

8. *See Harris v. H&W Contracting Co.*, 102 F.3d 516, 522 (11th Cir. 1996) (taking judicial notice that Graves disease, although entirely controlled in that case, "is capable of substantially limiting major life activities if left untreated by medication" and noting the potential effects in the absence of treatment).

9. *Bush Starts Daily Thyroid Medication*, Washington Post, July 10, 1991, at A2.

10. There are, of course, impairments which can be controlled only partially through the use of medications or other assistive (Cont'd)

inquiry into *actual* limitations, not hypothetical ones.[11] As the EEOC has recognized,

(Cont'd)
devices. When presented with such a case, a court would be obligated under the ADA to determine whether the residual limitations of the medicated condition are "substantial," as the statute requires. Similarly, the side effects of certain medications or devices might themselves impose substantial limitations; the Court need not decide in this case whether or how these side effects may be relevant to the ADA inquiry. Finally, there may be circumstances in which a plaintiff has refused to use available mitigating measures. In a case of that sort, the putative plaintiff may well not be "qualified" as required by the statute, but the Court need not decide that issue here; the Petitioners affirmatively allege that they use corrective lenses and that, as a result, they function with 20/20 vision.

11. The briefs of the EEOC and the Petitioners rely almost entirely on the EEOC's interpretive guidance and the assertion that the agency's interpretations are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Even if the EEOC's interpretations are the functional equivalent of regulations, as Petitioners argue (and they are not for the reasons given by the court of appeals), *Chevron* deference is not warranted here because the agency's interpretations are, in relevant part, flatly contradicted by the terms of the statute. *See, e.g., Dole v. United Steelworkers of America*, 494 U.S. 26, 43 (1990). The applicable terms of the ADA explicitly demand an assessment of the plaintiff's *actual* limitations, rather than conjecture about possible or theoretical ones; this case of statutory construction does not require deference to the EEOC. Moreover, the guidance is internally inconsistent. In it, the EEOC declares that conditions like appendicitis and broken bones are not disabilities because they are "temporary [and] non-chronic," 29 C.F.R. § 1630.2(j) App., but they can be classified as "temporary" conditions only if the impact of mitigating measures is considered; left untreated, a broken leg or an infection like appendicitis might well render an individual "substantially (Cont'd)

> [m]any impairments do not impact an individual's life to the degree that they constitute disabling impairments. . . . The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, *but rather on the effect of that impairment on the life of the individual.*

29 C.F.R. § 1630.2(j) App. (emphasis added). A fully corrected medical condition, by definition, *has* no real "effect . . . on the life of the individual" and therefore cannot be a disability.[12] *See Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct.

(Cont'd)
limited in one or more major life activities." Similarly, the guidance explains that an individual who "has *controlled* high blood pressure" might be "regarded as" disabled if his employer viewed him as disabled even though otherwise the controlled condition had no significant impact on the individual's ability to engage in major life activities. 29 C.F.R. § 1630.2(l) App.

12. Petitioners assert that when Congress passed the ADA, it implicitly approved of prior case law under the Rehabilitation Act. Pet. Br. at 24-25. ATA, however, has been unable to find a single Rehabilitation Act case holding that nearsightedness corrected to 20/20 is a disability. Petitioners claim that *Sharon v. Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986), is on point, but it is not. The case involved a myopic person whose vision was corrected with biopic lenses. The plaintiff, however, retained a significant blind spot around the central image. It was because of the central blind spot, not the level of uncorrected vision, that the court treated the plaintiff as handicapped. In *Collier v. City of Dallas*, 798 F.2d 1410 (5th Cir. 1986), *cited in Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994), the court held that vision correctable to 20/20 was not an impairment.

2196, 2206 (1998) (while ADA does not require demonstration that plaintiff is utterly incapable of performing a major life activity, it does require that there be an actual, substantial limitation; finding that HIV infection substantially limited the plaintiff in the major life activity of reproduction because "respondent [testified] that her HIV infection controlled her decision not to have a child").

The lower courts have been careful to confine the sweep of the ADA to cases involving truly *substantial* limitations.[13]

13. *See, e.g., Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997) (heart disease); *Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996) (heart disease); *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997) (epilepsy); *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019 (7th Cir. 1997) (blindness); *Swanks v. WMATA*, 116 F.3d 582 (D.C. Cir. 1997) (spina bifida); *Stone v. City of Mount Vernon*, 118 F.3d 92 (2d Cir. 1997) (paraplegia), *cert. denied*, 118 S. Ct. 1044 (1998). In contrast, courts have concluded that many permanent or chronic conditions are not disabilities or handicaps protected by the ADA or Rehabilitation Act because they have an insufficient impact on major life activities. *E.g., Perkins v. St. Louis County Water Co.*, 160 F.3d 446 (8th Cir. 1998) (Meniere's disease, which results in infrequent vertigo and vomiting, is not a disability); *Cantrell v. Nashville Electric Service*, 1999 U.S. App. LEXIS 1207 (6th Cir. Jan. 21, 1999) (allergy to hydraulic oil); *Gutridge v. Clure*, 153 F.3d 898, 900-91 (8th Cir. 1998) (carpal tunnel syndrome with lifting restrictions); *Williams v. Channel Master Satellite Sys, Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (25-lb. lifting limit not a disability), *cert. denied*, 520 U.S. 1240 (1997); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) (same); *Thompson v. Holy Family Hosp.*, 121 F.3d 537 (9th Cir. 1997) (25-pound lifting restriction for registered nurse does not substantially limit a major life activity); *Price v. Marathon Cheese Corp.*, 119 F.3d 330 (5th Cir. 1997) (carpal tunnel syndrome is not substantially limiting because plaintiff was able to do other jobs); *McKay v. Toyota Motor*

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Adopting the rule urged by Petitioners and the EEOC would distort the ADA — a statute designed to improve the lot of "a discrete, specific minority"[14] occupying "an inferior status in our society"[15] — into a cause of action available to nearly every working American to challenge any unfavorable employment decision. Authorizing such an unjustified expansion of the definition of "disability" would "debase [the] high purpose" of the statute. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (Rehabilitation Act case).

C. Correctable Visual Acuity Problems Are Not Substantially Limiting Disabilities

As explained in the preceding section, any inquiry into "the effect of [an] impairment on the life of [an] individual" necessarily will include an assessment of the effectiveness of mitigating measures. Correctable vision problems are a prime example. While the legislative history suggests that Congress understood "the term [disability to] include[] . . . visual . . . impairments . . ." S. Rep. No. 101-116 (1989), *reprinted in* H.R. Comm. on Education and Labor, 101st

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Mfg., 110 F.3d 369, 373 (6th Cir. 1997) (carpal tunnel syndrome); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (carpel tunnel syndrome and tendinitis); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454-56 (7th Cir. 1995) (strabismus); *Heilweil v. Mt. Sinai Hosp.*, 32 F.3d 718, 722 (2d Cir. 1994) (asthma), *cert. denied*, 513 U.S. 1147 (1995); *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986) (acrophobia).

14. H.R. Rep. No. 101-485(II), at 40, *reprinted in* 1990 U.S.C.A.A.N. at 322.

15. 42 U.S.C. § 12101(a)(6).

Cong., 2d Sess., Legislative History of Public Law 101-336, at 324 (Comm. Print 1990), this does not mean that Congress considered every vision problem, including commonplace, correctable nearsightedness, to be a "disability." Rather, the legislative history repeatedly refers to vision problems that substantially impair an individual's ability to work or see *even with* mitigating measures. For example, the Senate Committee report's list of "reasonable accommodations" notes that

> [f]or blind and visually-impaired persons . . . [an employer may be obligated to provide] adaptive hardware and software for computers, electronic visual aids, braille devices, talking calculators, magnifiers, audio recordings and brailled material.

S. Rep. No. 101-116 (1989), *reprinted in* H.R. Comm. on Education and Labor, at 130. The words "glasses" and "contact lenses" are notably absent from this list.

Because Petitioners' corrective lenses give them 20/20 vision, they are not in any sense substantially limited in the major life activity of seeing. Petitioners argue, however, that United's vision standards render them substantially limited in the major life activity of working. The claim is refuted even by the EEOC interpretive guidance on which Petitioners so heavily rely:

> [A]n individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess, or talent. *For example, an individual who cannot*

> *be a commercial airline pilot because of a minor vision impairment, but who can be a . . . pilot for a courier service, would not be substantially limited in the major life activity of working.* [An individual is not disabled simply because he or she cannot] perform either a particular specialized job or a narrow range of jobs.

29 C.F.R. § 1630.2(j) App. (emphasis added).[16]

In this case, Petitioners are alleged to be "experienced commercial pilots" who currently fly planes in passenger service for other airlines. J.A. 17, 19. They acknowledge that "other airlines [do] not share United's" hiring standards. Pet. Br. at 8. Thus, they do not allege that they are precluded from working as commercial airline pilots.[17] At most, Petitioners have alleged that they do not meet United's hiring standards. As even the EEOC recognizes, this is not sufficient.[18]

16. *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437 (10th Cir. 1996) (taxiing an aircraft is not a "class of jobs" but a single job duty that is not necessarily part of being a mechanic); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 805 (5th Cir. 1997) (plaintiff who wears pacemaker who cannot work as expediter at B&W facility is not substantially limited in working), *cert. denied*, 118 S. Ct. 1050 (1998); *Heilweil v. Mount Sinai Hosp..*, 32 F.3d 718, 723 (2d Cir. 1994) (asthmatic disqualified from only a narrow range of jobs is not handicapped), *cert. denied*, 513 U.S. 1147 (1995); *Webb v. Garelick Mfg.*, 94 F.3d 484 (8th Cir. 1996) (plaintiff with focal dystonia not disabled because he could work in occupations not involving handwriting and repetitive hand motions).

17. Petitioners describe the "class" of jobs from which United's rule excludes them as "global airline pilot." J.A. 25.

18. *See Zirpel v. Toshiba Am. Info. Sys., Inc.*, 111 F.3d 80, 81 (8th Cir. 1997) (as a matter of law, plaintiff's panic disorder did not

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II.

UNITED AIRLINES DID NOT "REGARD" PETITIONERS AS DISABLED SIMPLY BECAUSE THEY DID NOT MEET HIGH SELECTION CRITERIA

Petitioners also contend that United "regarded [them] as having" an "impairment that substantially limits them" in the major life activity of working. J.A. 9. To establish a claim under this ADA provision, the Petitioners would have to show that United actually regarded them: (1) as having an impairment; (2) which substantially limits them in working in "either a class of jobs or a broad range of jobs in various classes." *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366, 1369-70 (11th Cir. 1998); *see also* 29 C.F.R. § 1630.2(j)(3)(ii)(C).

Petitioners claim that United regarded them as unfit for the self-defined "class of jobs" called "global airline pilot." J.A. 25. That claim was properly rejected by the court of appeals. First, Petitioners have attempted to define themselves into a cause of action by inventing their own "class of jobs." "A 'class of jobs' consists of jobs in the geographic area in which the plaintiff resides that utilize 'similar training, knowledge, skills, or abilities' ". *Witter*, 138 F.3d at 1370, *quoting* 29 C.F.R. § 1630.2(j)(3)(ii)(B). "Global airline pilot" is not a legitimate job title, much less a proper label for a "class of jobs." Petitioners' own experience as pilots definitively demonstrates that they are capable of using their training, knowledge, skills, or abilities as pilots to fly

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substantially limit her in the major life activity of working where she had "had three jobs since her discharge, and she currently holds a . . . position nearly identical to the one she held" with defendant).

passengers in revenue service with a variety of other airlines. Moreover, as the Eleventh Circuit held in *Witter*, when a pilot brings a disability case, the appropriate class of jobs includes

> [s]uch jobs [as] pilot ground trainer, flight simulator trainer, flight instructor, aeronautical school instructor, as well as executive, management, and administrative positions in flight operations for airlines, and being a consultant for an aircraft manufacturer.

Id. at 1370.

Moreover, it is indisputable that United knew: (1) that the current FAA minimum vision standards permitted Petitioners to get a first class certificate from the FAA; (2) that Petitioners were, at the time, working for other carriers as commercial airline pilots; and (3) that Petitioners' eyesight would be acceptable under the hiring standards applicable at a variety of other airlines. Thus, when it applied its own hiring standards in rejecting Petitioner's applications, United knew only that there were better-qualified candidates available for its pilot vacancies, positions for which the competition is fierce and the requirements are exacting.

Petitioners seem to argue that their "regarded as" claim can survive without any allegation that United believed that they *actually* were excluded from a whole class of jobs — even the class of jobs as they define it — so long as they allege that United believed that other carriers hypothetically *should* have excluded them. The argument shares the same disdain for reality as Petitioners' anti-textual reading of the substantial limitation inquiry; it ignores the plain language of the statute, which specifically requires an *actual* — not a

hypothetical — substantial limitation of a major life activity.[19] Because United knew that Petitioners could meet the minimum vision standards imposed by the FAA and the hiring standards of other air carriers, United did not regard Petitioners as possessing an impairment that substantially limits their ability to find employment as a pilot. United

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19. *See, e.g., Tardie v. Rehabilitation Hosp. of Rhode Island*, 1999 U.S. App. LEXIS 2877 (1st Cir. Feb. 24, 1999) (employer who perceived that plaintiff with heart condition was unable to work more than 40 hours per week did not regard plaintiff as disabled because a person who cannot work more than 40 hours per week is not substantially limited in a major life activity); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 646 (2d Cir. 1998) ("It is not enough, however, that the employer regarded that individual as somehow disabled; rather, the plaintiff must show that the employer regarded the individual as disabled within the meaning of the ADA. [citation omitted] Thus, in order to prevail, the plaintiffs were required to adduce evidence that the County regarded each officer as having an impairment that substantially limited a major life activity. This the officers failed to do."), *pet. for cert. filed*, 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1164); *Deas v. River West, L.P.*, 152 F.3d 471, 476, 481 (5th Cir. 1998) ("to have made a prima facie showing of disability, Deas must have produced sufficient evidence for a reasonable trier of fact to conclude that Dr. Dixon perceived her as having an 'impairment' and that this impairment, if it existed as perceived by Dr. Dixon, would have substantially limited one or more of Deas' major life activities"; "Dr. Dixon's belief that Deas was incapable of fulfilling the essential functions of an 'addiction technician' in a hospital substance abuse treatment unit does not establish that she regarded her as being substantially limited in her ability to work in general"), *pet. for cert. filed*, 67 U.S.L.W. 3438 (U.S. Dec. 30, 1998) (No. 98-1057); *Harrington v. Rice Lake Weighing Sys., Inc.*, 122 F.3d 456, 460-61 (7th Cir. 1997) ("The notion that Rice Lake must have fired Harrington because it regarded him as disabled and that it plainly regarded him as disabled because it fired him is attractive but circular — it lacks a causal antecedent.").

rejected their applications,[20] but there is no allegation that United regarded Petitioners as unemployable as commercial pilots elsewhere — or even substantially limited in their employment opportunities.

III.

AIR CARRIERS HAVE AN OBLIGATION UNDER THE FEDERAL AVIATION ACT TO OPERATE WITH THE HIGHEST DEGREE OF SAFETY

A. Safety Is The Essence Of An Airline's Business

The Federal Aviation Act requires commercial air carriers to operate with the "highest possible degree of safety in the public interest." 49 U.S.C. § 44701(b). In *Western Air Lines v. Criswell*, 472 U.S. 400 (1985), this Court described safety as the "essence" of the air carrier's function, and observed that

> [t]he uncertainty implicit in the concept of managing safety risks always makes it "reasonably necessary" to err on the side of caution in a close case. The employer cannot be expected to establish the risk of an airline accident "to a certainty, for certainty would require running the risk until a

20. An employer is entitled to choose the most able among qualified candidates, even where the unsuccessful candidate's relative shortcomings are attributable to an actual disability. *See e.g.*, *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997) (Posner, C.J.). For the reasons described above, Petitioners' relative shortcomings do not amount to, or stem from, an actual disability.

> tragic accident would prove that the judgment was sound."

Id. at 419-20 (citation omitted). As the D.C. Circuit earlier observed in a pilot hiring case, *Murnane v. American Airlines*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982):

> [T]he airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact. Therefore, in our judgment, the *airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely. . . . Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer.*

Id. at 101 (emphasis added).[21]

21. *See also Coupe v. Federal Express Corp.*, 121 F.3d 1022, 1025 (6th Cir. 1997) ("We know, moreover, that [operating with] the 'highest degree of safety in the public interest' is 'reasonably necessary' to Federal Express's aircraft operations — for Congress has said so"), *cert. denied*, 118 S. Ct. 1300 (1998); *EEOC v. American Airlines*, 48 F.3d 164, 170-71 (5th Cir. 1995) (quoting with approval *Murnane*'s conclusions regarding court's inability to second guess carrier's standards when related directly to operational safety); *Johnson v. American Airlines*, 745 F.2d 988, 993 (5th Cir. 1984) (holding that "[c]ourts simply do not possess the expertise with which to supplant [the airline's] judgment" with respect to safety issues), *cert. denied*, 472 U.S. 1027 (1985); *Spurlock v. United Airlines*, 475

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B. The Minimum Licensing Standards Of The Federal Aviation Administration Do Not Define The Limits Of Carrier Safety Obligations

The Federal Aviation Act distinguishes expressly between the air carriers' obligation to maintain the *highest* standard, and the FAA's lesser obligation to set "*minimum*" standards. 49 U.S.C. §§ 44701(b), (d) (1998). As explained in the FAA Air Transportation Operations Inspector's Handbook, the higher standard to which a carrier is held obligates the carrier to take safety precautions irrespective of the FAA's minimum standards:

> The FAA . . . has the duty, as authorized by 49 U.S.C., subtitle VII, § 40101, ["Aviation Programs"] to establish *minimum* standards, rules, and national policy which provide adequately for national security and safety in air commerce. . . .
>
> 49 U.S.C. § 44701 specifies that, when prescribing standards and regulations and in issuing certificates, the FAA shall give full consideration "to the duty resting upon air operators to perform their services with the *highest* possible degree of safety in the public interest . . ." In other words, 49 U.S.C. charges the FAA with the responsibility of promulgating and enforcing *adequate* standards and regulations. At the same time, 49 U.S.C. recognizes that holders of air operator certificates have a direct responsibility of providing air transportation with the *highest* possible

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F.2d 216, 219 (10th Cir. 1972) ("risks involved in hiring an unqualified applicant [as an airline pilot] are staggering"; the "public interest clearly lies in having the most highly qualified persons available to pilot airliners").

> degree of safety. The meaning of 49 U.S.C. § 44701(b), should be clearly understood. *It means that this duty (or responsibility) rests directly with the air operator, irrespective of any action taken or not taken by an individual FAA inspector or the FAA.*

FAA Air Transportation Operation's Inspector's Handbook, DOT publication no. 8700.10 CHG 16, at 2-8 (Dec. 22, 1997) ("FAA Handbook") (emphasis added).[22] Federal courts have held that the Federal Aviation Act encourages air carriers to set standards higher than the minimums promulgated by the FAA:

> [T]hat American [Airline's medical] criteria exceed the FAA's minimum requirements is irrelevant. An airline is free to impose more stringent requirements, and "must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*."

Robinson v. American Airlines, 908 F.2d at 1023 (*quoting Murnane*, 667 F.2d at 101) (emphasis in original).

The position advanced by the Petitioners and the EEOC threatens this framework. The EEOC suggests that the Court should effectively ignore the "substantial limitation" inquiry demanded by the ADA because an airline might rely on its vision standard later in the case in arguing that a particular candidate was unqualified or posed a "direct threat" to her

22. *See also* FAA Handbook at 2-8 (FAA "has the duty to establish minimum standards . . ."; "safety standards applicable to air transportation (air carriers) are more stringent than standards applicable to persons or organizations not involved in common carriage").

own safety or the safety of others. EEOC Br. at 12. The EEOC's suggestion is grounded in the dubious premise that the risks and costs of case-by-case litigation should not be a concern to air carriers. To the contrary, the prospect of continuous litigation with disappointed applicants who are not actually disabled would create a perverse incentive for airlines to lower their hiring standards to the FAA's minimums, effectively turning those regulatory floors into a ceiling contrary to Congress's explicit statutory design. Moreover, mounting a "direct threat" defense would require an airline to shoulder the difficult, and perhaps impossible, burden of proving that lower hiring standards would pose a "high probability of substantial harm,"[23] *i.e.*, to "run[] the risk until a tragic accident [would] prove that [its hiring standard was] sound." *Criswell*, 472 U.S. at 419-20. Absent express direction from Congress that it intended to displace the FAA's longstanding safety regime, the Court should give primacy to the mandate of public safety while simultaneously giving a sensible reading to the ADA and its animating principles.

C. Vision Standards Adopted By The FAA And ATA's Members Are An Inseparable Part Of Their Respective Safety Programs

From 1962[24] until 1994, the FAA measured the visual

23. 29 C.F.R. § 1630.2(r) App.

24. Federal air safety regulations, including the uncorrected vision standards, were first codified under the aegis of the Federal Aviation Administration in 1962. These standards actually extended back even further in time as regulations of predecessor agencies. *Medical Standards and Certification*, 27 Fed. Reg. 7980 (1962).

acuity of an applicant for a first- or second-class airman medical certificate based on his or her *uncorrected* vision.[25] The FAA's benchmark standard — in place for over 30 years as an FAA requirement — was adopted by many air carriers as their own standard, and is the standard in effect at United Airlines at issue in this case.[26]

In 1982, FAA began a review of all of its medical standards for airmen and enlisted the American Medical Association (AMA) to provide professional and technical guidance. *Review of Medical Standards and Certification Procedures*, 47 Fed. Reg. 30,795 (1982). The AMA report, issued on March 26, 1986, recommended that the FAA *retain* its reliance on an uncorrected vision standard.[27] Nevertheless,

25. A pilot flying for a commercial carrier such as United must have a first class medical certificate. 14 C.F.R. § 61.23 (1998).

26. Petitioners correctly point out that some carriers treat applicants and incumbents differently with respect vision standards. That, however, does not make the hiring standard irrational, as Petitioners assert. As the D.C. Circuit observed in *Robinson v. American Airlines*, carriers rely on this applicant/incumbent distinction on the entirely reasonable premise that

> pilots who are familiar with [an airlines'] unique safety procedures by virtue of their experience in [that airline's] cockpits, but who might no longer meet all of its initial-hire medical criteria, present less of an overall safety risk than new pilots who, while meeting the initial medical standards, are unfamiliar with [the airline's] safety procedures.

Id. 908 F.2d at 1023.

27. A.L. Engelberg and T.C. Doege, *Review of Part 67 of the Federal Air Regulations and the Medical Certification of Civilian Airmen*, vol. 1, p. I-7 (Amer. Medical Ass'n 1986). For the Court's convenience, a copy of the AMA report has been lodged with the Clerk's office.

eight years later, in 1994, the FAA eliminated its minimum standard for uncorrected vision, not on the basis of any scientific or statistical data, but to "administratively simplify[ ] the certification process."[28]

Thus, the uncorrected vision benchmark relied upon by United in this case is no antiquated relic, as petitioners suggest; it was used by the FAA well after the passage of the ADA. Moreover, other federal agencies charged with issuing and administering safety standards continue to apply similar benchmarks. Both the Navy and Air Force rely on an "uncorrected vision" standard for their pilots,[29] and the Department of Transportation uses an "uncorrected" vision standard for licensing certain merchant marines. 46 C.F.R. § 10.205. When Congress enacted the ADA, federal agencies

28. *Revision of Medical Standards and Certification Procedures*, 59 Fed. Reg. 53,226, 53,232 (1994). Prior to 1994, the FAA had entertained applications for waivers of its vision standards for pilots who could achieve the required minimum vision standard through spectacles or contact lenses. To reduce the administrative burden of considering and granting exceptions, from 1986 to 1994, the FAA used a simplified procedure for special issuance of certifications to pilots whose uncorrected distant vision was worse than 20/100 but not worse than 20/200. FAA- certified Aviation Medical Examiners ["AME"] were given permission to evaluate applicants without further referral to eye specialists or to the FAA, and, in the absence of significant eye pathology, the AME could issue a certificate to a pilot whose vision was corrected to 20/20. *Id.* at 53,231-232.

29. *See Air Force Publications, AFI 48-123: Medical Examination and Standards*, <http://afpubs.hq.af.mil/elec-products/pubpages/48-pubs.stm> at p. 99; *Aeromedical Reference and Waiver Guide: Physical Exams and Standards*, <http://www.nomi.navy.mil/code04/toc97nf.htm> at p. 5. Copies of these documents have been lodged with the Clerk for the Court's convenience.

(including, at the time, the FAA), were routinely relying on just the sort of "uncorrected vision" standard used by United. In light of the federal government's continued reliance on these reasonable standards, there is simply no merit to Petitioners' insistence that standards of this sort are necessarily unlawful. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (presuming congressional awareness and approval of administrative regulations); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-20 (1975) ("We may assume that Congress was aware that the [National Labor Relations] Board, since its inception, has awarded backpay as a matter of course").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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